

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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| P & F LUMBER CO. (2000), LLC, | * | |
| a Louisiana limited liability company, and | * | |
| EDWARD B. POITEVENT, II, | * | Civil Action No.: |
| Plaintiffs, | * | |
| v. | * | Judge |
| | * | |
| United States Department of the Interior | * | |
| and the United States Fish and Wildlife Service, | * | Magistrate |
| Defendants. | * | |

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552**

Plaintiffs P & F Lumber Co. (2000), LLC and Edward B. Poitevent, II (collectively, “Plaintiffs”), through undersigned counsel respectfully come to this Court to state the complaint and seek the relief set forth below:

Jurisdiction and Venue

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to compel the Defendants to produce to the Plaintiffs certain specified records subject to the disclosure requirements of the act and not exempt under any statutory exemptions.

2. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA), 5 U.S.C. § 704 (judicial review of a final agency action), and 28 U.S.C. § 1331 (federal question).

3. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391 because the Plaintiff Poitevent resides in this District and because Plaintiff P & F Lumber's principal place of business is in this District.

The Parties

4. Plaintiff P & F Lumber Co. (2000) LLC ("P&F Lumber") is a Louisiana limited liability company. Its principal place of business is New Orleans, Louisiana.

5. Plaintiff Edward B. Poitevent, II, is an attorney admitted to practice in Louisiana. He is a manager of P&F Lumber as well as a member of that limited liability company.

6. Defendant The United States Department of the Interior ("Department of the Interior") is an agency of the United States. It is an agency within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(f)(1).

7. Defendant the United States Fish and Wildlife Service ("FWS") is an agency within the Department of the Interior. It is an agency within the meaning of the Freedom of Information Act, 5 U.S.C. § 552(f)(1).

8. FWS and the Department of the Interior have possession of and control over the records that the Plaintiffs seek.

The FOIA Requests

9. Plaintiffs made a series of requests (the "FOIA Requests") pursuant to the Freedom of Information Act, 5 U.S.C. § 552, on August 4th and August 5th of 2011. Those requests are attached hereto as Exhibits A and B.

10. The FOIA Requests sought records concerning whether the Mississippi gopher frog has been found in Louisiana and the decision of the FWS to establish a "critical habitat" for the Mississippi gopher frog in Louisiana.

11. The FOIA Requests are:

- a. All USFWS [United States Fish and Wildlife Service] documents (including but not limited to correspondence, e-mails, notes, memoranda, photographs, permits, reports, studies, maps, analyses, plans, and/or any type of electronic data, recording or audio tape) concerning or relating to the existence or non-existence in the State of Louisiana of the Mississippi gopher frog. 190, (i) in the State of Louisiana and (ii) the 1,649 acres of land shown on the attached aerial photograph in St. Tammany Parish, Louisiana (the “1,649 Acres”).
- b. All documents (including but not limited to correspondence, e-mails, notes, memoranda, photographs, permits, reports, studies, analyses, plans, maps, and/or any type of electronic data, recording, or audio tape) concerning or relating to the USFWS’s proposed rulemaking to establish a critical habitat for the Mississippi gopher frog on the 1,649 Acres.
- c. All documents relating to any and all lawsuits, judgments, court orders, consent decrees or other orders, and all forms of discovery relating thereto, involving the USFWS and the establishment of critical habitat for the Mississippi gopher frog.(including but not limited to depositions, interrogatories and answers thereto. correspondence, e-mails, notes, memoranda, photographs, permits, reports, studies, analyses, plans, and/or any type of electronic data, recording, or audio tape).
- d. All USFWS documents (including but not limited to all reports, drafts, analyses, correspondence, e-mails, contracts, notes, memoranda, photographs, permits, reports, studies, maps, plans, and/or any type of electronic data, recording or audio tape) concerning or relating to an economic analysis concerning the designation of a critical habitat for the Mississippi gopher frog on the 1,649 acres

of land shown on the attached aerial photograph in St. Tammany Parish, Louisiana performed or being performed by Industrial Economics, Incorporated, Cambridge, Massachusetts, or any other firm, person or entity.

12. The FWS acknowledged receipt of the FOIA Requests on August 8, 2011, and assigned tracking number FWS-2011-01083 to the FOIA Requests.

13. By August 18, 2011, FWS had identified records responsive to the FOIA Requests and informed Plaintiffs that the cost for searching the records had already reached \$246. FWS asked Plaintiffs if they would approve incurring further costs.

14. Plaintiffs agreed to cover costs up to \$750 and asked to be informed if the costs would rise above that.

15. On August 29, 2011, FWS informed Plaintiffs that costs had reached \$750 and that an additional \$500 to \$750 would be necessary to complete the review.

16. Plaintiffs approved costs up to \$1500.

17. On September 9, 2011, FWS informed Plaintiffs that the \$1500 threshold had been reached, and that a few hundred more was needed.

18. Plaintiffs approved a new limit of \$2000 on the same day.

19. A charge of nearly \$2000 suggests that FWS had located a significant quantity of records responsive to the FOIA Requests.

20. The Plaintiffs received some records responsive to the FOIA Requests. These consisted of approximately 200 pages of documents and approximately 46 photographs.

21. On October 28, 2011, FWS denied certain of the FOIA Requests and withheld from production certain records, and with respect to certain other records, produced only redacted records on the grounds that they were exempt from disclosure under the deliberative process exemption of 5 U.S.C. § 552(b)(5).

22. The Index of Withheld and Redacted Documents (the “Vaughn Index”) is attached hereto as Exhibit C. The Vaughn Index lists fifteen documents. Documents 1, 2, 3, 7, 10, 12, 14, and 15 have been redacted. Documents 3, 4, 5, 6, 8, 9, 11, and 13 have been completely withheld. FWS did not produce the Vaughn Index to Plaintiffs until January 18, 2012.

23. The documents listed on the Vaughn Index were withheld or redacted because of “attorney-client” or the deliberative process exemption. Neither the index nor the letter from the FWS denying production of the records explains whether “attorney-client” means the FWS believes that the document is privileged from production because it is an attorney-client communication or that the document is immune from production under the attorney work product immunity. Some of the withheld communications plainly are not attorney-client communications.

24. The Vaughn Index includes the name of the authors and recipients of the documents withheld or redacted but does not indicate the role of the author or recipient to explain why the document was withheld or redacted. The absence of any indication of whether the persons who wrote or received the documents were employees of FWS or third parties, and the failure to indicate whether the individuals were attorneys or acting under the direction of attorneys, renders the Index wholly inadequate.

25. Certain redacted documents contain enough information to show that they had been sent outside the FWS or originated outside FWS. For example, Documents Nos. 3, 7, 12, 13, 14, and 15 were sent to or by Lindsey Ludwig, a person apparently affiliated with Industrial Economics, Inc. Those communications outside the FWS are not entitled to attorney-client privilege or the deliberative process exemption. Plaintiffs are entitled to receive those documents forthwith.

26. Plaintiffs timely appealed this decision of the FWS to the Office of the Solicitor of the Department of the Interior in an appeal designated as 2012-020.

27. The Department of the Interior affirmed the FWS's denial of the "Requests on the grounds that the records redacted or withheld are exempt from disclosure under the deliberative process exemption or under "attorney-work product privilege of exemption."

28. Because the standards for determining the applicability of the attorney-client privilege are different from the standards for the work-product immunity, the Index is wholly inadequate to assess the appropriateness of the FWS's decision to redact or withhold the documents.

29. The records in question have been improperly withheld.

30. There is a strong public interest in the records sought because they relate to the designation of a substantial amount of property as a critical habitat for a species of wildlife listed as endangered.

31. The deliberative process exemption does not properly apply to the records the FWS refuses to produce. The records sought are post-decisional documents that cannot be subject to the deliberative process exemption.

32. Even if the documents are pre-decisional, the records sought and withheld reflect factual and investigative matters, not deliberative process.

33. Neither the FWS nor the Office of the Solicitor of the Department of the Interior did not sufficiently assert either attorney-client privilege or work-product immunity because neither agency clearly stated which theory of privilege or immunity applied to which records.

34. FWS and the Department of the Interior failed to provide an index of records withheld on the basis of a privilege or immunity sufficient to allow the Plaintiffs to test the adequacy of such a claim.

35. Upon information and belief, FWS has withheld other responsive records that do not appear on the log.

First Cause of Action

36. Plaintiffs incorporate herein by reference each and every allegation contained in paragraphs 1 through 34 above.

37. Plaintiffs have a legal right under the Freedom of Information Act to obtain all of the records responsive to the Requests. No legal basis for withholding the records exists.

38. The Defendants' failure to make promptly available the records Plaintiff sought violates the Freedom of Information Act, 5 U.S.C. §§ 552(a)(3)(A) and 552(a)(6)(A)(ii), and applicable regulations promulgated thereunder.

39. The records sought are relevant to a public hearing on the establishment of a habitat for the Mississippi Gopher Frog that is scheduled for January 31, 2012. A proposed rulemaking concerning the Mississippi Gopher Frog was published in the Federal Register on September 27, 2011. A copy of proposed rulemaking is attached as Exhibit D. The notice of the January 31 hearing was published on January 17, 2012. A copy of that notice is attached as Exhibit E. Plaintiffs requested the records long before the hearing was scheduled, with ample time to review the material to prepare for the hearing. Plaintiffs are entitled to expedited production of those records.

WHEREFORE, Plaintiffs P & F Lumber Co. (2000), LLC and Edward B. Poitevent, II respectfully request that the Court award them the following relief:

1. Expedite this action in every way pursuant to 28 U.S.C. § 1657(a);
2. Order Defendants FWS and the Department of the Interior to disclose immediately the requested records to the Plaintiffs;


3. Order Defendants FWS and the Department of the Interior to make copies of the records and provide them to the Plaintiffs;
4. Declare that Defendants FWS and the Department of the Interior violated the Freedom of Information Act;
5. Award Plaintiffs their reasonable costs and attorneys' fees as provided by 5 U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as the Court may deem just and proper.

Dated this 20th day of January, 2012.

Respectfully submitted,

**BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC**

BY:



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